BRIEF

OF THE

GRAND COUNCIL OF THE CREES (EEYOU ISTCHEE) /

CREE NATION GOVERNMENT

TO THE

EXPERT PANEL

ON

THE REVIEW OF ENVIRONMENTAL ASSESSMENT PROCESSES

DECEMBER 22, 2016

TABLE OF CONTENTS

I. INTRODUCTION 2

II. CONTEXT 3

A The Crees and Eeyou Istchee 3

B The James Bay and Northern Québec Agreement 3

III. SECTION 22 OF THE JBNQA 4

A Overview of Section 22 of the JBNQA 4

B Decision of the Supreme court of Canada in *Moses* 6

IV. SECTION 24 OF THE JBNQA 8

V. SECTION 28 OF THE JBNQA 9

VI. BILL C-38 AND BILL C-45 9

VII. ADVERSE EFFECTS OF BILLS C-38 AND C-45 9

A Adverse Effect on the Crees, their Hunting Territories and on Eeyou Istchee 9

B Reduction of Environmental Protection 10

C No Accommodation of Special JBNQA Context or Cree Participation 12

D Amendments to the Fisheries Act and Impacts on Triggers 12

E Amendments to the NWPA and Impacts on Triggers 14

VIII. PROCESS LEADING UP TO BILLS C-38 AND C-45 15

IX. SOLUTIONS RELATED TO THE TRIGGERS 15

A Suitable Legislation regarding Fisheries and Related Triggers 15

B Suitable Legislation Regarding Navigable Waters and Related Triggers 16

C Reinstate the Fisheries Act and Navigable Waters Triggers in A Revised Federal Assessment Process 17

X. SOLUTIONS RELATED TO THE PROCESS 17

A Use of the Treaty Process for the Assessment 18

XI. CONCLUSION 19

SCHEDULE A MAP 21

SCHEDULE B PRESENTATION TO THE EXPERT PANEL ON FEDERAL ASSESSMENT PROCESS 22

I. INTRODUCTION

1. The Grand Council of the Crees (Eeyou Istchee) ("**GCC(EI)**") is the political body that represents the approximately 18,000 Crees of Eeyou Istchee, the traditional homeland of the Crees in James Bay. The Cree Nation Government ("**CNG**") is the "Cree Native Party" for the purposes of the *James Bay and Northern Quebec Agreement.*

2. Over close to 40 years, the Crees have signed many agreements with the Governments of Québec and Canada, thus creating a unique legal framework in Eeyou Istchee. They include, among others: in **1975**, the *James Bay and Northern Québec Agreement* ("**JBNQA**"), signed with Canada and Québec[1], in **2002**, the *Agreement Concerning a New Relationship between le Gouvernement du Québec and the Crees of Québec*, often called the "Paix des Braves", in **2008**, the *Agreement concerning a New Relationship between Canada and the Crees of Eeyou Istchee* ("**2008 Cree-Canada New Relationship Agreement**") and in **2012**, the *Agreement on Governance in the Eeyou Istchee James Bay Territory between the Crees of Eeyou Istchee and the Gouvernement du Québec*.[2]

3. Modern treaties such as the JBNQA attempt to further the objective of reconciliation, the grand purpose of section 35 of the *Constitution Act, 1982*, not only by addressing grievances over the land claims but by creating the legal basis to foster a positive long-term relationship between Aboriginal and non-Aboriginal communities[3].

4. The JBNQA establishes several co-management regimes, including with respect to environmental and social protection and the regime related to hunting, fishing and trapping in the Territory, as recognized in case law.[4] Through the agreements listed above, the Crees continue to assume more and more responsibilities with respect to co-management, including responsibilities regarding governance in the territory and co-management of natural resources. Such co-management mechanisms help ensure that development in Eeyou Istchee is sustainable and respectful of Cree rights.

5. There is a need to modernize social and environmental assessment of projects in Eeyou Istchee and to ensure that the protection of ecosystem is put at the forefront of the decision-making process. The GCC(EI)/CNG sees four (4) main areas which require major reforms:

   a) There is a need to change the triggers of federal assessment and to restore robust oversight and thorough environmental assessments of areas under federal jurisdiction;

   b) There is a need to ensure that the JBNQA bodies carry out the assessments in Eeyou Istchee, with the participation of the required federal bodies;

   c) There is a need to ensure that the JBNQA process benefits from the modern tools available for other processes in order to make it more transparent;

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1 Since amended by 24 complementary agreements.

2 Approved by Bill 42 of 2013, *An Act establishing the Eeyou Istchee James Bay Regional Government and introducing certain legislative amendments concerning the Cree Nation Government* (S.Q. 2013, c. 19).

3 *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103, par. 10.

4 *Makivik et al. v. Québec*, 2014 QCCA, 1455, see notably para. 67 and 68.

d) There is a need to ensure that the Crees benefit socially and economically from the projects being developed in Eeyou Istchee.

6. In the present brief, the GCC(EI)/CNG will address the reasons behind such reforms and will present solutions.

II. CONTEXT

A THE CREES AND EEYOU ISTCHEE

7. There are more than 18,000 Crees of Eeyou Istchee, and about 16,000 of them reside in the several Cree communities at any one time. For thousands of years, the Crees have lived in their traditional homeland of Eeyou Istchee which is intensively used and managed by the Crees in their traditional activities of hunting, fishing and trapping, which remain the foundation of their culture and economy. This territory is the basis of the Cree traditional economy and self-sufficiency.

8. The attached map shows the Cree traditional family territories (**SCHEDULE A**[5]). The Crees use all resources of Eeyou Istchee to exercise their right to hunt, fish and trap in the context of their economy and for personal and community purposes.

9. Eeyou Istchee contains numerous navigable waters, including waters navigable by canoe or by other types of vessels, small, medium or large. The Crees have used the navigable waters, rivers and other water bodies of Eeyou Istchee since time immemorial for their traditional activities, including their right to hunt, fish and trap, and to travel to exercise such rights. Cree treaty rights to harvest include the right to fish[6] and the right to travel[7]. Fish are and have always been, for the Cree, a staple food in their diet.

10. The Crees also manage their harvest in a manner that ensures the protection of various species, as set out in the treaty. The Crees also use the migratory birds as an essential element of their diet. The Crees manage the land in such a way as to ensure that the environment is protected.

11. The system of Cree traplines or family hunting territories is a global system; any cumulative impacts on one trapline must also be considered within the entire territory. The protection of fish and fish habitat, navigable waters, species at risk, migratory birds and the environment is particularly important to the Cree who take into account cumulative effects of any development or project in Eeyou Istchee.

B THE JAMES BAY AND NORTHERN QUÉBEC AGREEMENT

12. In the early 1970's, the Crees and the Northern Quebec Inuit opposed the construction of the hydroelectric development project which came to be known as the James Bay Hydroelectric Project or, more specifically, the La Grande (1975) Hydroelectric Complex, and instituted legal proceedings to halt it. Out-of-court negotiations led to the conclusion, on November 11, 1975, of the JBNQA between the Crees, the Inuit, Canada, Québec and certain other parties.

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5 **Schedule A** shows the system of Cree traplines recognized by the JBNQA (see par. 24.3.25 thereof).

6 JBNQA, para. 24.3.1.

7 JBNQA, para. 24.3.13.

13. The JBNQA, the first modern treaty concluded between Aboriginal peoples and governments in Canada, was approved, given effect to and declared valid by federal[8] and provincial[9] legislations. Under these Acts, the Crees enjoy the rights, privileges and benefits set out in the JBNQA as treaty and statutory rights[10]. Moreover, the JBNQA prevails when inconsistencies or conflicts arise.[11]

14. The JBNQA is a land claim agreement and treaty under section 35 of the *Constitution Act, 1982*[12] and the rights of the Crees provided for in the JBNQA are existing treaty rights recognized, affirmed and protected under sections 35 and 52 of the *Constitution Act, 1982*.

15. The protection of the environment and of traditional Cree hunting, fishing and trapping activities (sometimes called "harvesting" activities) and the Cree participation in economic development were of fundamental concern to the Crees in the negotiations leading to the conclusion of the JBNQA. These matters are addressed in Sections 22, 24 and 28 of the JBNQA.

III. SECTION 22 OF THE JBNQA

A OVERVIEW OF SECTION 22 OF THE JBNQA

16. Section 22 of the JBNQA establishes the environmental and social protection regime in the JBNQA Territory, which includes a comprehensive environmental assessment and review process for development projects, the first such process in Canada.

17. Paragraph 22.2.2 outlines the main elements of the regime:

> **22.2.2** The said regime provides for:
>
> a) A procedure whereby environmental and social laws and regulations and land use regulations may from time to time be adopted if necessary to minimize the negative impact of development in or affecting the Territory upon the Native people and the wildlife resources of the Territory;
>
> b) An environmental and social impact assessment and review procedure established to minimize the environmental and social impact of development when negative on the Native people and the wildlife resources of the Territory;
>
> c) A special status and involvement for the Cree people over and above that provided for in procedures involving the general public through consultation or representative mechanisms wherever such is necessary to protect or give effect to the rights and guarantees in favour of the Native people established by and in accordance with the Agreement;

8 *James Bay and Northern Québec Native Claims Settlement Act*, S.C. 1976-77, c. 32.

9 *Act approving the Agreement concerning James Bay and Northern Québec*, S.Q. 1976, c. 46, now CQLR, c. C-67.

10 *James Bay and Northern Québec Native Claims Settlement Act*, para. 3(2); *Act approving the Agreement concerning James Bay and Northern Québec*, para. 2.2.

11 *James Bay and Northern Québec Native Claims Settlement Act*, s. 8; *Act approving the Agreement concerning James Bay and Northern Québec*, s. 6.

12 *Québec (Attorney General) v. Moses, [2010]* 1 S.C.R. 557, paras. 15, 106. See also *Makivik et al. v. Québec*, 2014 QCCA, 1455.

d) The protection of the rights and guarantees of the Cree people established by and in accordance with Section 24;

e) The protection of the Cree people, their economies and the wildlife resources upon which they depend;

f) The right to develop in the Territory.

18. Paragraph 22.2.3 provides for the application in the Territory of federal laws of general application respecting environmental and social protection, to the extent that they are not inconsistent with the JBNQA and Section 22. It also requires governments to adopt "suitable legislation" to give effect to Section 22:

> **22.2.3** All applicable federal and provincial laws of general application respecting environmental and social protection shall apply in the Territory to the extent that they are not inconsistent with the provisions of the Agreement and in particular of this Section. If necessary to give effect to the present Section of the Agreement, Québec and Canada shall take the required measures to adopt suitable legislation and regulations for such purpose.

19. Paragraph 22.2.4 requires governments to give due consideration to certain guiding principles:

> **22.2.4** The responsible governments and the agencies created in virtue of this Section shall within the limits of their respective jurisdictions or functions as the case may be give due consideration to the following guiding principles:
>
> a) The protection of the hunting, fishing and trapping rights of Native people in the Territory, and their other rights in Category I lands, with respect to developmental activity affecting the Territory;
>
> b) The environmental and social protection regime with respect to minimizing the impacts on Native people by developmental activity affecting the Territory;
>
> c) The protection of Native people, societies, communities, economies, with respect to developmental activity affecting the Territory;
>
> d) The protection of wildlife resources, physical and biotic environment, and ecological systems in the Territory with respect to developmental activity affecting the Territory;
>
> e) The rights and guarantees of the Native people within Category II established by and in accordance with Section 24 until such land is developed;
>
> f) The involvement of the Cree people in the application of this regime;
>
> g) The rights and interests of non-Native people, whatever they may be;
>
> h) The right to develop by persons acting lawfully in the Territory;
>
> i) The minimizing of negative environmental and social impacts of development on Native people and on Native communities by reasonable means with special

> reference to those measures proposed or recommended by the impact assessment and review procedure.

20. The three committees established under Section 22 of the JBNQA are:

    a) COMEV for "Comité d'évaluation" mandated to screen developments and to recommend levels of assessment, if any. COMEV is composed of 6 members appointed by Québec, Canada and the Cree Nation Government;

    b) COMEX or "Comité d'examen" mandated to review provincial projects. COMEX is composed of five members, three appointed by Québec and two appointed by the Cree Nation Government; and

    c) COFEX for "Comité fédéral d'examen" mandated to review federal projects. COFEX is composed of three members appointed by the Federal Government and two members appointed by the Cree Nation Government.

B DECISION OF THE SUPREME COURT OF CANADA IN *MOSES*

21. On August 19, 2004, the GCC(EI)/CRA filed legal proceedings in the Superior Court of Quebec seeking, among other things, the federal assessment, under Section 22 of the JBNQA, of a large vanadium mining development project at Lac Doré near Chibougamau ("**Vanadium Mine Project**").

22. At the time, Canada had failed to initiate the federal review process under Section 22 in respect of the Vanadium Mine Project. Instead, Canada had referred the Vanadium Mine Project to a review panel under the CEAA 1992, without mandatory Cree participation and without regard for the terms of reference set out under Section 22 of the JBNQA.

23. In its decision issued on March 30, 2006 (corrected on April 27, 2006),[13] the Superior Court found, among other things, that the environmental assessment process under the CEAA 1992 was incompatible with the environmental and social impact assessment process under Section 22 of the JBNQA. The Court held that the CEAA 1992 process was incompatible with the constitutionally affirmed treaty right of the Crees to participate fully in the environmental and social impact assessment of development projects in the Territory.

24. The Superior Court emphasized the right of the Crees under Section 22 of the JBNQA to participate fully in the management, control and regulation of development in the Territory:

> [TRANSLATION]
>
> [146] The provisions of Section 22 are clear; they are intended to ensure to the Crees their full participation and the respect of their rights in the management, control and regulation of development in the territory. Thus any assessment or review of the impacts of a project must be carried out in compliance with the provisions agreed, failing which, the fiduciary duty is violated and the treaty right is emptied of its content.

[13] *Moses v. Canada*, (2006) QCCS 1832.

25. For similar reasons, the Quebec Court of Appeal also found that the CEAA 1992 environmental assessment process was incompatible with the process established under Section 22 of the JBNQA.[14]

26. On May 14, 2010, the Supreme Court of Canada rendered its judgement in *Moses*.[15] The majority held that the CEAA 1992 procedure applied in the Territory and was not incompatible with Section 22 of the JBNQA. However, it also held that the CEAA 1992 process must be applied by Canada in compliance with Canada's constitutional duty to consult the Crees on matters affecting their treaty rights. Further, the CEAA process must be structured to accommodate the special context of a project proposal in the Territory, including the participation of the Cree:

> [45] … The *CEAA* procedure governs but, of course, it must be applied by the federal government in a way that fully respects the Crown's duty to consult the Cree on matters affecting their James Bay Treaty rights in accordance with the principles established in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 32, *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, and in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388.
>
> […]
>
> [48] Common sense as well as legal requirements suggest that the *CEAA* assessment will be structured to accommodate the special context of a project proposal in the James Bay Treaty territory, including the participation of the Cree.
>
> [Emphasis added]

27. The minority of the Supreme Court in *Moses* agreed with the courts below that "[t]he federal process under the CEAA, which does not provide for either substantive or procedural participation by the Cree, is inconsistent with the provisions of the Agreement and cannot apply".[16]

28. The majority and the minority disagreed in *Moses* on the compatibility of the environmental assessment procedures under CEAA 1992 and under Section 22. Nevertheless, they agreed, at the very least, that the CEAA process must be structured to accommodate the special context of a project proposal in the Territory, including the participation of the Crees. It was also common ground that Canada has a duty to consult and accommodate the Crees on matters that may adversely affect Cree rights under the JBNQA.

29. In particular, in order to meet the requirements of Section 22, federal environmental laws applicable in the Territory must provide for a special status and involvement for the Crees in order to protect and give effect to their rights and guarantees under the Agreement.

30. As to this special involvement of the Crees, Madame Justice Deschamps (dissenting in the result, but not in this regard) stated in *Moses*:[17]

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14 *Moses v. Canada*, 2008 QCCA 741; unofficial English translation: [2009] 1 C.N.L.R. 169.
15 2010 SCC 17, [2010] 1 S.C.R. 557.
16 Ibid., para. 140.
17 *Moses*, para. 126.

> The overarching purpose of Section 22 is to ensure the participation of and consultation with Aboriginal peoples [i.e. the Crees] at all stages of the environmental assessment process while promoting an efficient process … [*emphasis added*.]

IV. SECTION 24 OF THE JBNQA

31. Section 24 of the JBNQA establishes a "Hunting, Fishing and Trapping Regime" for the Cree, Inuit and Naskapi. This regime was established to protect Native harvesting rights, which includes the right to fish, ensure the sustainable management of wildlife resources in the JBNQA Territory and provide for the participation of the Cree, Inuit and Naskapi beneficiaries in such management.

32. The regime established by Section 24 of the JBNQA, and the hunting, fishing and trapping rights of the Crees provided for therein, are intimately related to the environmental and social protection regime established by Section 22 of the JBNQA:

> **24.11.1** The rights and guarantees of the Native People established by and in accordance with this Section shall be guaranteed, protected and given effect to with respect to environmental and social protection by and in accordance with Section 22 and Section 23.

33. In addition, the JBQNA specifies that the right to harvest includes the right to travel for harvesting purposes:

> **24.3.13** The right to harvest shall include the right to travel and establish such camps as are necessary to exercise that right, in accordance with the terms and conditions of the Agreement.

34. The JBQNA specifies that the Hunting, Fishing and Trapping Regime established by and in accordance with Section 24 of the JBNQA is subject to the principle of conservation:

> **24.1.5** "Conservation" means the pursuit of the optimum natural productivity of all living resources and the protection of the ecological systems of the Territory so as to protect endangered species and to ensure primarily the continuance of the traditional pursuits of the Native people and secondarily the satisfaction of the needs of non-Native people for sport hunting and fishing

35. Hence, federal assessment of projects and federal legislation regarding fisheries, navigable waters, species at risk, migratory birds and the environment must comply with the principle of conservation in order to protect fish and fish habitat, navigable waters, species at risk, migratory birds as well as the physical and biotic environment and ecosystems in the JBNQA Territory.

36. In order to give true meaning to Cree treaty rights, efforts are made by the GCC(EI)/CNG to ensure that projects constructed in Eeyou Istchee are designed and constructed in such a manner as to ensure the protection of fish and fish habitat, navigable waters, species at risk, migratory birds and the environment, including through the design and execution of remedial works or mitigation measures. For example, in the context of the Rupert River diversion, important efforts were made to ensure that the proponent would restore the natural potential of the Rupert River, to maintain its navigability, to replace hunting camps and enhance fishing places traditionally used by the Crees.

Over the years, the efforts to save the fisheries and other harvesting activities on the Rupert River were significant and involved the work of federal and provincial experts in collaboration with the Crees.

V. SECTION 28 OF THE JBNQA

37. Section 28 of the JBNQA includes among others, provisions regarding Training Courses, Job Recruitment and Placement, Cree Participation in Employment and Contract and Assistance to Cree Entrepreneurs. These provisions must be taken into account when developing a solution to the problems created by Bills C-38 and C-45.

VI. BILL C-38 AND BILL C-45

38. Bills C-38 and C-45[18] are so-called "omnibus" laws to implement federal budget measures. They also purport to amend or replace certain federal environmental laws, including the *Canadian Environmental Assessment Act* of 1992[19] ("**CEAA 1992**"), the *Fisheries Act*[20] and the *Navigable Waters Protection Act*[21] ("**NWPA**").

39. The GCC(EI)/CNG was ready to challenge Bills C-38 and C-45 in the courts. However, it was decided to first trigger the Dispute Resolution Process which is provided by the 2008 Cree-Canada New Relationship Agreement (the "**Dispute**").

40. The reasons why the *Canadian Environmental Assessment Act, 2012* ("**CEAA 2012**"), the amended *Fisheries Act* and new *Navigation Protection Act*[22] ("**NPA**") are problematic in JBNQA Territory are set out in a document dated September 2013, which is confidential under the Dispute Resolution Process. Ironically, the federal reviews which led to CEAA 2012 contributed to block the Cree-Canada discussions which were ongoing further to the *Moses*[23] judgment on CEAA 1992 and the JBNQA. The GCC(EI) / CNG expects that this mistake will not be repeated and that, this time, the ongoing federal reviews will rather enhance and accelerate the settlement of the Dispute through a process with the Crees, with clear mandates, and including Quebec, if the province decides to participate.

VII. ADVERSE EFFECTS OF BILLS C-38 AND C-45

A ADVERSE EFFECT ON THE CREES, THEIR HUNTING TERRITORIES AND ON EEYOU ISTCHEE

41. The exercise of the hunting, fishing and trapping rights of the Crees are protected under Section 22 and Section 24 of the JBNQA and are highly dependent on the protection of fish and fish habitat, of

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18 Bill C-38, the *Jobs, Growth and Long-term Prosperity Act*, became the *Jobs, Growth and Long-term Prosperity Act*, S.C. 2012, c. 19. Bill C-45, the *Jobs and Growth Act*, became the *Jobs and Growth Act*, S.C. 2012, c. 31.

19 S.C. 1992, c. 37.

20 R.S.C. 1985, c. F-14.

21 R.S.C. 1985, c. N-22.

22 *Ibid*.

23 *Québec (Attorney General) v. Moses*, [2010] 1 S.C.R. 557.

navigable waters, of species at risk, migratory birds and of the environment of the James Bay Territory and some adjacent areas.

42. The failure to adequately protect fish and fish habitat, navigable waters, species at risk, migratory birds and the environment constitutes and amounts to the expropriation or appropriation by Canada of Cree rights and jeopardizes the right of the Crees to their way of life, which results in severe social and economic consequences for individual Crees and their communities and their harvesting territories including the rivers and water bodies of Eeyou Istchee. It also leads to improper construction and use of projects, bridges, culverts and other works in drainage basins, which have impacts on fish or fish habitat, navigation, species at risk, migratory birds and the environment. This is particularly true when forestry operations are carried out.

43. It is important to note that even small projects which do not undergo social and environmental impact assessment can have important effects on fish and fish habitat, through the combined and cumulative effects of development.

B REDUCTION OF ENVIRONMENTAL PROTECTION

44. Bill C-38 reduces the scope and strength of the environmental and social protection regime for the Crees set forth in Section 22 of the JBNQA.

- ***Replacement of CEAA 1992 by CEAA 2012***

45. Bill C-38 replaces CEAA 1992 by CEAA 2012. Certain of the main changes introduced by CEAA 2012 and of special concern to the Crees include, without limitation, the following:

a) **Projects.** In general, environmental assessments under CEAA 1992 were intended to predict environmental effects of proposed projects before they were carried out to minimize or avoid or reduce adverse effects. Generally speaking, the process was "triggered" whenever a federal authority proposed, financed, enabled a project to be carried out on federal lands, or provided certain licences, permits or approvals to enable the project to be carried out. Examples are authorizations under section 35(2) of the *Fisheries Act* and an approval under section 5 of the *Navigable Waters Protection Act*.

b) "**Designated Projects**". By contrast, CEAA 2012 contemplates environmental assessments only for "designated projects", defined as being projects carried out in Canada or on federal lands, that are designated by regulation or in an order made by the Minister, and are linked to the same federal authority specified in the regulation or order.

c) **Assessment Not Automatic.** Even for "designated projects", an environmental assessment is not automatic. The Agency determines if an environmental assessment will be required, based on the project's potential for "environmental effects" in areas of federal jurisdiction.

d) **Scope of Review.** The CEAA 2012 significantly narrows the scope of review. Under CEAA 1992, an assessment considered <u>any change</u> to the environment, and any impact of such changes on health and socio-economic conditions, physical and cultural heritage, or current use of lands by aboriginal persons.

e) "**Significant Adverse Effects**". CEAA 2012 focuses federal assessment efforts on "designated projects" that can have "significant adverse environmental effects". It requires consideration of whether or not, taking into account the appropriate mitigation measures, the significant adverse effects are justified in the circumstances. The Federal Cabinet is empowered to make the final determination in this regard, ensuring political oversight of the process.

f) **Public Hearings.** Not all environmental assessments under CEAA 2012 require public hearings. In a "standard" environmental assessment, public participation may be by way of written comments. A public hearing will be held only if the Minister of the Environment considers it to be in the "public interest".

g) **Substitution**. CEAA 2012 provides for the substitution of the CEAA 2012 process with an equivalent process of another jurisdiction. The Minister of the Environment must allow a provincial process to substitute for a federal environmental assessment to be conducted by the Agency, but not federal decision-making,

(i) if requested to do so by the other jurisdiction,

(ii) the Minister is of the opinion that the provincial process is an appropriate substitute for an assessment under CEAA 2012, and

(iii) the required conditions are met.

The Federal Cabinet may also order a substitution, even if not requested by another jurisdiction, on the recommendation of the Minister. This power of substitution applies for provinces as well as other jurisdictions, such as an Aboriginal land claim body. In cases of substitution, the Minister of the Environment makes the decision on the project using the environmental assessment report prepared by the province or other jurisdiction.

h) **Timelines.** CEAA 2012 establishes shorter timelines for hearings and assessments, subject to possible time extensions: twelve (12) months for standard environmental assessments and twenty-four (24) months for panel reviews.

46. We must also emphasize the following:

a) the authorization to carry on any work or undertaking that resulted in the harmful alteration, disruption or destruction of fish habitat – referred to as "HADD" - under section 35(2) of the *Fisheries Act*, as it was then, automatically triggered a federal environmental assessment under CEAA 1992. This is no longer the case under CEAA 2012; and

b) the authorization of works built or placed in, on, over, under, through or across any navigable water under section 5(1) of the NWPA automatically triggered a federal environmental assessment under CEAA 1992, while this authorization no longer triggers an environmental assessment under CEAA 2012.

47. The deletion in CEAA 2012 of triggers in respect of the approval of projects that could alter, disrupt or destroy fish habitat or that require a permit when built or placed in, on, over, under, through or across any navigable water is contrary to the environmental and social protection regime applicable

in the Territory under Section 22 of the JBNQA and contrary to the hunting, fishing and trapping rights of the Crees protected under Section 24 of the JBNQA.

- ***Fish and fish habitat***

48. Prior to the coming into force of Bill C-38, section 35 of the *Fisheries Act* prohibited any work or undertaking that resulted in the harmful alteration or disruption or the destruction (HADD), of fish habitat.

49. However, Bill C-38 limits such protection to only those works, undertakings or activities which would permanently alter or destroy fish habitats and that are part of a commercial, recreational or Aboriginal fishery, or cause the death of fish that support such a fishery.

- ***Navigable Waters Protection Act***

50. The NPA will no longer prohibit works in all navigable waters, but only prohibit works on navigable waters that are listed in the schedule. The NPA excludes the vast majority of lakes and rivers from its application. None of the lakes and rivers in Eeyou Istchee is listed in the schedule. These amendments significantly weaken environmental protection of water bodies.

C NO ACCOMMODATION OF SPECIAL JBNQA CONTEXT OR CREE PARTICIPATION

51. CEAA 2012 deprives the Crees of the "special status and involvement" required by Section 22 of the JBNQA in environmental assessment processes in the Territory.

52. CEAA 2012 also does not accommodate the special context of a project proposal in the Territory, including the participation of the Cree, as required by the JBNQA and the Supreme Court of Canada in the *Moses* decision.

53. Moreover, CEAA 2012 confers wide discretionary powers on the Agency, the federal Minister of Environment, the federal Cabinet, the National Energy Board, the Canadian Nuclear Safety Commission and various committees, without any mandatory participation by the Crees at all stages of the process.

54. In its current form, CEAA 2012, by not requiring the mandatory participation by the Crees at all stages of the process, establishes an unstructured and discretionary administrative regime infringing upon, without justification, the treaty rights of the Crees regarding the environmental and social protection regime and the hunting, fishing and trapping regime established by and in accordance with Sections 22 and 24 of the JBNQA.

D AMENDMENTS TO THE FISHERIES ACT AND IMPACTS ON TRIGGERS

55. The amendments to the *Fisheries Act* and to CEAA 1992 have had a negative impact on the protection of ecosystems. In order to restore robust oversight and thorough environmental assessments of areas under federal jurisdiction, the triggers of federal assessment which predated Bills C-38 and C-45 should be restored and enhanced. The first step for such triggers to be restored and enhanced is to ensure that the Fisheries Act is corrected.

56. Any federal environmental laws of general application that are to apply in the Territory, including federal assessment legislation, the *Fisheries Act* and the NPA, must be consistent with Section 22 of the JBNQA, give effect to Section 22 and minimize the negative impact of development in or affecting the Territory upon the Crees and the wildlife resources of the Territory.

57. The deletion in CEAA 2012 of triggers regarding the *Fisheries Act* authorization scheme, the reduction of the protection of fish and fish habitat resulting from the amendments to the *Fisheries Act*, the deletion in CEAA 2012 of triggers regarding navigable waters and the reduction of the protection of navigable waters resulting from the amendments to the NWPA are contrary to the environmental and social protection regime applicable in the Territory under Section 22, as well as to the hunting, fishing and trapping regime established pursuant to Section 24 of the JBNQA.

58. Among other things, Bill C-38 modified one of the most notable section of the former *Fisheries Act*, section 35 (1), which provided that: "*No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat*" – this was also referred to as the "HADD" provision.

59. The exception to this provision was found in section 35(2) [24] of the former *Fisheries Act*, which provided that a person could only contravene section 35(1) under conditions authorized by the Minister or under the regulations.[25]

60. The section 35 (2) authorization of the Minister to contravene section 35(1) of the *Fisheries Act* always triggered an environmental assessment under CEAA 1992[26].

61. Bill C-38 modified section 35(1) of the former *Fisheries Act* so that it now reads as follows:

> **35 (1)** No person shall carry on any work, undertaking or activity that results in **serious harm to fish that are part** of a commercial, recreational or Aboriginal **fishery**, or to fish that support such a fishery. [*Our emphasis*.]

62. Bill C-38 therefore modified the former section 35(1) in two significant ways:

a) It now only protects fish from "serious harm", which is defined in the *Fisheries Act* to mean "the death of fish or permanent alteration to, or destruction of, fish habitat"; and

b) The above protection only applies to commercial, recreational or Aboriginal fisheries, and no longer extends to all fish and fish habitat.

63. Therefore, the requirement for a ministerial authorization under the new section 35(2) of the *Fisheries Act* now applies only where there could be the death of fish or the permanent alteration to, or destruction, of fish habitat, rather than having the lesser threshold of the harmful alteration, disruption or destruction of fish habitat (HADD).

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[24] Section 35(2) of the *Fisheries Act* previously stated that "No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this Act."

[25] No regulations were enacted for this purpose.

[26] Section 5(1)(d), CEAA 1992; pursuant to paragraphs 59(f) of that Act, subsection 35(2) of the *Fisheries Act* was listed under the *Law List Regulations*, SOR/94-636.

64. Although "fish habitat" is no longer specifically mentioned at section 35(1), the definition of "serious harm to fish" includes permanent alteration to, or destruction of, fish habitat. Thus, while some measure of fish habitat protection remains, the protection against only permanent alteration or destruction of fish habitat is insufficient.[27]

65. The reference to the prohibition to cause "serious harm to fish" that are part of a commercial, recreational or Aboriginal fishery[28], or to fish that support such a fishery could be seen positively. However, the fact remains that it is only permanent alteration to, or destruction of, fish habitat, whether it be part of Aboriginal fisheries or not, that requires a permit. This is insufficient and inconsistent with Sections 22 and 24 of the JBNQA.

66. The above amendments significantly weaken the environmental protection of fish and fish habitat in Eeyou Istchee and are contrary to the environmental and social protection regime applicable in the Territory.

67. If the prohibition reverts to the HADD test, then the reference to Aboriginal fishery could become meaningful.

E AMENDMENTS TO THE NWPA AND IMPACTS ON TRIGGERS

68. The replacement of the *Navigable Waters Protection Act* by the *Navigation Protection Act* and the amendments to CEAA have also had a negative impact on the protection of ecosystems. Again, in order to restore robust oversight and thorough environmental assessments of areas under federal jurisdiction, the triggers of federal assessment which predated Bills C-38 and C-45 should be restored and enhanced. The first step for such triggers to be restored and enhanced is to ensure that the *Navigation Protection Act* is corrected.

69. Bill C-45 amends the *Navigable Waters Protection Act*, renaming it the *Navigation Protection Act*, a clear indication of the change in emphasis from protection of the environment, small vessel navigation and local economies to the protection of major commerce and navigation. The NPA will no longer regulate works in all navigable waters, but only regulate works on navigable waters that are listed in the schedule.

70. This schedule to the NPA only lists 100 lakes (including oceans) and 64 rivers and riverines, excluding therefore the vast majority of lakes and rivers from its application. None of the lakes and rivers of Eeyou Istchee are listed in the schedule to the NPA. As such, these amendments significantly weaken environmental protection of water bodies in Eeyou Istchee and is contrary to the environmental and social protection regime applicable in the Territory under Section 22 and the harvesting rights under Section 24 of the JBNQA.

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[27] It was presented by the Department of Fisheries and Oceans ("**DFO**") that DFO's broad interpretation under its policies afford more protection to fish and fish habitat. However, the DFO's interpretation is not binding, and said protection is not entrenched in the wording of the enacted legislation.

[28] Bill C-45 amended the definition of Aboriginal fishery that was introduced in Bill C-38, which reads as follows: "*Aboriginal, in relation to a fishery, means that fish is harvested by an Aboriginal organization or any of its members for the purpose of using the fish as food, for social or ceremonial purposes or for purposes set out in a land claims agreement entered into with the Aboriginal organization*"

VIII. PROCESS LEADING UP TO BILLS C-38 AND C-45

71. The process leading up to Bills C-38 and C-45 took place without the consent or consultation of the Crees, and without any consultation of the James Bay Advisory Committee on the Environment ("**JBACE**"), despite the clear impacts of these measures on the environmental and social protection regime for the Crees under Section 22 and on the hunting, fishing and trapping regime under Section 24 of the JBNQA and despite the *Moses* and *Makivik* decisions in respect of meaningful Cree involvement.

72. The consultation of the JBACE[29] is a positive treaty and legal obligation incumbent upon governments when formulating laws such as those amended by Bills C-38 and C-45.

IX. SOLUTIONS RELATED TO THE TRIGGERS

73. The following are solutions that could be implemented in relation to the triggers:

a) enact suitable legislation in order to protect all fish and fish habitat in Eeyou Istchee notably by restoring the prohibition on harmful alteration, disruption or destruction – HADD - of fish habitat through an efficient and modern process, with Cree involvement;

b) enact suitable legislation in order to protect the navigable waters in Eeyou Istchee through an efficient and modern process, based on the "canoe test", with Cree involvement;

c) reinstate the requirement of an assessment when an authorization is required under the *Fisheries Act* and when a navigable water permit is required for, at the very least, projects located in the JBNQA territory, within the context of a modernized Section 22 of the JBNQA;

d) add, as triggers for such assessments :

(i) projects included in the CEAA 2012 *Regulations Designating Physical Activities* (SOR/2012-146) or amendments thereto:

(ii) projects that could alter or harm species at-risk under the *Species at Risk Act* or migratory birds under the *Migratory Birds Convention Act*, or their habitats;

(iii) other projects requiring federal approvals such as those contemplated by the former *Law List Regulation*[30]; and

(iv) projects jointly determined to be subject to assessment.

74. Some of these solutions are more fully explained below.

A SUITABLE LEGISLATION REGARDING FISHERIES AND RELATED TRIGGERS

75. In Eeyou Istchee, in order to be consistent with Cree exercise of their harvesting rights in Cree life and economy which is based on hunting, fishing and trapping, it is essential to protect fish and fish

[29] JBNQA, para. 22.3.24 to 22.3.28.
[30] *Law List Regulations*, SOR/94-636.

habitat and to safeguard marine and freshwater biodiversity and ecosystems. To ensure consistency with the treaty harvesting rights of the Crees, including the right to fish, it is necessary that federal legislation comply with the principle of conservation; hence, it is essential that such legislation adequately ensure the protection of the ecosystems.

76. It is therefore suggested:

a) to restore the HADD protection;

b) to create a process by which the GCC(EI)/CNG would be involved in the decision-making related to the issuance of the permit issued in Eeyou Istchee;

c) to put in place safeguards to ensure Cree participation in the development at hand in view of protecting fish and fish habitat;

d) to put in place a process by which orders could be issued to ensure the development projects do not create harmful alteration, disruption or destruction – HADD - of fish habitat, including stop-work orders. The GCC(EI)/CNG would again be involved in an efficient and modern decision-making process related to the issuance of such orders in Eeyou Istchee; and

e) to create a joint process to correct the deficiencies of the *Fisheries Act* regarding monitoring. Such deficiencies stem from the fact that, when proponents do not request permits, Canada does not apply the *Fisheries Act*. Such a proponent-driven scheme is inefficient.

77. The GCC(EI)/CNG and the James Bay Advisory Committee on the Environment should be involved in the preparation of the amendments to the legislation or the preparation of new legislation.

B SUITABLE LEGISLATION REGARDING NAVIGABLE WATERS AND RELATED TRIGGERS

78. Although the case law is not determinative, Transport Canada has stated publicly that it uses the "aqueous highway test" rather than the "canoe test" to define navigable waters[31].

37. In Eeyou Istchee, in order to be consistent with Cree use of navigable waters in Cree economy based on hunting, fishing and trapping, the navigable waters which require protection would need to meet certain criteria stemming from relevant case law:

(a) any river, stream or water body navigable in fact, that is, capable in its natural state of being traversed by large or small craft of some sort, as large as steam vessels and as small as canoes, skiffs and rafts drawing less than one foot of water;

(b) such river, stream or water body may be navigable over part of its course and not navigable in other parts; its capacity for navigation may be determined independently at different locations and at different times;

(c) to be navigable, a river, stream or water body need not in fact be used for navigation so long as realistically it is capable of being so used;

[31] See for example : https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/navigation-protection/fact-sheet-determining-navigability.html (consulted on November 1st, 2016)

(d) any navigable water remains navigable even when conditions change either by the forces of nature or by the construction of works affecting navigation;

(e) any non-navigable water which become navigable due to forces of nature or due to construction is considered thereon as a navigable water;

(f) navigation need not be continuous but may fluctuate seasonally; and

(g) interruptions to navigation such as rapids on an otherwise navigable stream, river or water body which may be circumvented do not render said water non-navigable.

79. In other words, the test in Eeyou Istchee should be the "canoe test" rather than the "aqueous highway test" to ensure consistency with the treaty harvesting rights of the Crees, including the right to travel to exercise such rights.

80. Consequently, the use of a schedule that lists the oceans, lakes, rivers or streams that are considered navigable waters for the purpose of the NPA should not be favoured.

81. All works in, on, over, under, through or across Eeyou Istchee's navigable waters or which will affect navigable waters should require a permit prior to any construction or operation to ensure that the navigable waters stay navigable, including through the design and execution of remedial works or mitigation measures. The GCC(EI)/CNG would be involved in an efficient and modern decision-making process related to the issuance of the permit issued in Eeyou Istchee. Safeguards would be put in place to ensure Cree participation in the development at hand.

82. Unauthorized works could be removed on order or orders could be issued to ensure the navigability of waters that are non-navigable as a result of works, including stop-work orders. The GCC(EI)/CNG would again be involved in an efficient and modern decision-making process related to the issuance of such orders in Eeyou Istchee.

83. Moreover, the GCC(EI)/CNG and the James Bay Advisory Committee on the Environment should be involved in the preparation of the amendments to the legislation or the preparation of new legislation.

C REINSTATE THE FISHERIES ACT AND NAVIGABLE WATERS TRIGGERS IN A REVISED FEDERAL ASSESSMENT PROCESS

84. The triggers related to the protection of fish and fish habitat and navigable waters should be reinstated in a federal assessment process structured to ensure harmonization with Section 22 of the JBNQA and the protection of hunting, fishing and trapping rights under Section 24. Basically, an assessment would be carried out whenever a permit is required under the "suitable" fisheries and navigable water legislation framework described above.

X. SOLUTIONS RELATED TO THE PROCESS

85. The following are solutions that could be implemented in relation to the process:

a) ensure that the treaty bodies are used when assessing projects, rather than foreign entities, while ensuring that the Canadian Environmental Assessment Agency, Fisheries and Oceans

Canada, the Ministry of the Environment and Climate Change Canada, Transport Canada, the National Energy Board and the Canadian Nuclear Safety Commission all contribute to the process, through the JBNQA structures;

b) amend the JBNQA in order to ensure the transparency of the social and environmental assessment process; and

c) ensure that the provisions of the JBNQA regarding Training Courses, Job Recruitment and Placement, Cree Participation in Employment and Contract and Assistance to Cree Entrepreneurs are implemented throughout.

86. Some of these solutions are more fully explained below.

A USE OF THE TREATY PROCESS FOR THE ASSESSMENT

87. On October 27, 2016, the GCC(EI)/CNG presented how Section 22 of the JBNQA should be modernized to the Expert Panel responsible for the review of the federal environmental assessment processes. **SCHEDULE B** hereof provides a copy of the October 27, 2016 GCC(EI)/CNG presentation.

88. Section 22 of the JBNQA contains the first modern regime to assess development projects. This assessment is done by tripartite and bipartite committees that assess both the environmental and social impacts of projects. One of the main objectives of the regime is to ensure that the Cree hunting, fishing and trapping rights and rights to participate in development are protected in the context of any and all developments in Eeyou Istchee, the traditional territory of the Crees.

89. It is important to maintain the stability, predictability and certainty of the treaty process. Although each party to the JBNQA is free to change its members to such committees, the use of the treaty bodies is beneficial for all; the members gain knowledge of the territory and of its ecology, of the social issues at hand, of the people inhabiting the territory and of the developments at hand, as well as the cumulative impacts thereof. This paves the way to good decisions.

90. The solution for JBNQA territory is anchored in three (3) basic principles:

a) all reviews have to be done by the JBNQA Section 22 entities, not by entities that are foreign to the territory and its inhabitants;

b) all projects which have impacts on matters of federal jurisdiction, like navigable waters, fisheries, migratory birds or species at risk, or which are otherwise triggered, should be screened and assessed; and

c) the required permits from all authorities should also be obtained.

91. In other words, a provincial project such as a mine would be assessed by COMEX. If such project has potential impacts on matters of federal jurisdiction, like navigable waters, fisheries, migratory birds or species at risk, migratory birds, or if other jointly agreed triggers required it, it should also be assessed by COFEX. The COMEX and COFEX processes can be merged if agreed to. Finally, all required permits should be obtained.

92. The Canadian Environmental Assessment Agency, Fisheries and Oceans Canada, the Ministry of the Environment and Climate Change Canada, Transport Canada, the National Energy Board and the Canadian Nuclear Safety Commission should all contribute to this process as required but, through the JBNQA structures.

93. See, at the end of this document, the summary flow-charts which demonstrate how federal assessment is currently carried out in JBNQA territory and how we see it evolving (see the flow-charts entitled "Current Process for Assessments under the JBNQA and CEAA 2012" and "Proposed Process for Assessments under the JBNQA and federal legislation").

XI. CONCLUSION

94. In summary, the GCC(EI)/CNG favours:

a) the enactment of suitable legislation regarding fisheries, which would restore adequate protection of all fish and fish habitat and which would provide for Cree involvement in efficient and modern decision-making processes compatible with the principles of sustainable development and conservation;

b) the enactment of suitable legislation regarding navigable waters which would protect all navigable waters that meet the "canoe test" and which would provide for Cree involvement in efficient and modern decision-making processes thereunder compatible with sustainable development and conservation;

c) amendments to Section 22 of the JBNQA in order to ensure that projects are properly assessed through JBNQA structures under a modernized regime using the treaty bodies rather than foreign entities, while ensuring that the Canadian Environmental Assessment Agency, Fisheries and Oceans Canada, the Ministry of the Environment and Climate Change Canada, Transport Canada, the National Energy Board and the Canadian Nuclear Safety Commission all contribute to the process, through the JBNQA structures;

d) amendments to the JBNQA in order to ensure the transparency of the social and environmental assessment process;

e) reinstate the requirement of an assessment when an authorization is required under the *Fisheries Act* and when a navigable water permit is required for, at the very least, projects located in the JBNQA territory, within the context of a modernized Section 22 of the JBNQA; and

f) add, as triggers for such assessments :

(i) projects included in the CEAA 2012 *Regulations Designating Physical Activities* (SOR/2012-146) or amendments thereto:

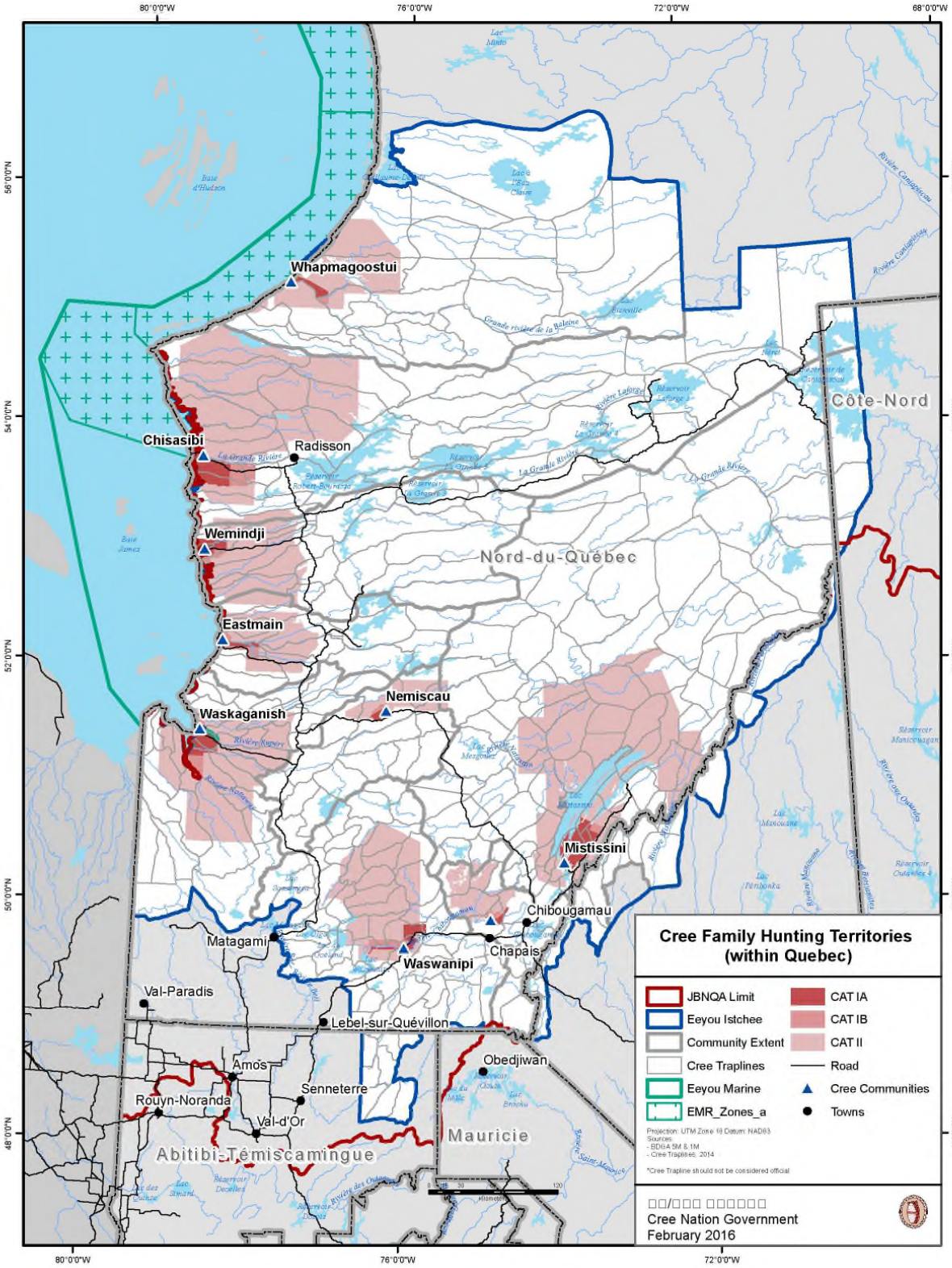
(ii) projects that could alter or harm species at-risk under the *Species at Risk Act* or migratory birds under the *Migratory Birds Convention Act*, or their habitats; and

(iii) other projects requiring federal approvals such as those contemplated by the former Law List Regulation; and

(iv) projects jointly determined to be subject to assessment.

95. The above solutions are consistent with Cree society, sustainable development of the territory, the principle of conservation, Cree participation in development and the assumption by the Crees of more responsibilities with respect to co-management in the Territory.

SCHEDULE A
MAP



SCHEDULE B
PRESENTATION TO THE EXPERT PANEL ON FEDERAL ASSESSMENT PROCESS

PRESENTATION OF THE GRAND COUNCIL OF THE CREES (EEYOU ISTCHEE) / CREE NATION GOVERNMENT TO THE EXPERT PANEL

REVIEW OF ENVIRONMENTAL ASSESSMENT PROCESSES

OCTOBER 27, 2016

1. The Grand Council of the Crees was formed in 1974. It was then the Cree entity mandated by the Cree Chiefs of the various Québec James Bay communities to represent regional interests.

2. With the signing of Canada's first modern treaty in 1975, the *James Bay and Northern Québec Agreement* (JBNQA), and subsequent amendments, it is now the Cree Nation Government who is the Native Party to the JBNQA mandated to execute amendments thereto, together with the responsible governments and government agencies.

3. Section 22 of the JBNQA contains the first modern regime to assess development projects. This assessment is done by tripartite and bipartite committees that assess both the **environmental and social impacts** of projects. One of the main objectives of the regime is to ensure that the Cree hunting, fishing and trapping rights and rights to participate in development are protected in the context of development in Eeyou Istchee, the traditional territory of the Crees.

4. The three committees established under Section 22 of the JBNQA are:

   a) the COMEV for "Comité d'évaluation" mandated to screen developments and to recommend levels of assessment, if any. COMEV is composed of 6 members appointed by Québec, Canada and the Cree Nation Government;

   b) COMEX or "Comité d'examen" mandated to review provincial projects. COMEX is composed of five members, three appointed by Québec and two appointed by the Cree Nation Government;

c) COFEX for “Comité fédéral d’examen” mandated to review federal projects. COFEX is composed of three members appointed by the Federal Government and two members appointed by the Cree Nation Government.

5. Over the years, the Crees have been involved in litigation regarding Section 22 of the JBNQA and the various federal assessment tools external to the JBNQA, including the EARP (Environmental Assessment and Review Process) guidelines and CEAA 1992.

6. The Crees never considered that the projects should be distinguished as “provincial” or “federal” as a result of their nature. This distinction is the result of the case law, most notably the *Eastmain*[32] decision as well as the *Moses*[33] decision of the Supreme Court of Canada.

7. The federal assessment tools external to the JBNQA have always been problematic. They set out a foreign regime in JBNQA territory.

8. The Crees have always tried to convince their federal counterparts to use the existing JBNQA structures to assess all projects and not to impose a foreign process to them.

9. We have only succeeded once in ensuring that structures similar to the JBNQA structures be used to assess a project. In 2003, Canada agreed to the “*Agreement concerning the Environmental Assessments of the Eastmain 1-A and Rupert Diversion Project*” which sets out that, in addition to the COMEX review of the project, a review would be conducted by a joint Canada-Cree panel composed,

[32] Eastmain Band *v.* Canada (Federal Administrator), [1993] 1 F.C. 501.
[33] Quebec (Attorney General) *v.* Moses, 2010 SCC 17, [2010] 1 S.C.R. 557.

like COFEX, of three members appointed by the Federal Government and two members appointed by the Cree Nation Government.

10. In the *Moses* judgment, the Supreme Court was convinced of the Cree arguments in respect to the necessity to ensure Cree participation in the assessment of projects in a manner compatible with the JBNQA process, even when the assessment is external to the treaty. Justice Binnie wrote the following simple sentence that captures it all:

    [48] Common sense as well as legal requirements suggest that the CEAA assessment will be structured to accommodate the special context of a project proposal in the James Bay Treaty territory, including the participation of the Cree.

11. For us, this simply means that a project assessed by COMEX should also be assessed by COFEX when called for with respect to its federal components.

12. We have been in discussions with Canada since 2010 in an attempt to ensure that changes called for in the *Moses* judgment are negotiated and properly implemented.

13. In 2012, Canada decided to completely do away with CEAA as it existed in 1992 to create a new CEAA without taking into consideration the *Moses* judgment, Section 22 of the JBNQA and the ongoing Cree-Canada discussions.

14. The Grand Council of the Crees and the Cree Nation Government have opposed CEAA 2012 since its inception.

15. We were ready to challenge CEAA 2012 in the Courts but we first triggered the

Dispute Resolution Process which is provided by the 2008 New Relationship Agreement we signed with Canada. We have set out in detail the reasons why CEAA 2012 is problematic in JBNQA territory in a document dated September 2013, which is confidential under the Dispute Resolution Process.

16. Thereafter, we have provided to our federal counterparts two (2) other confidential documents:

a) in February 2014, what we referred to as an "Outline of the Adapted Federal Assessment Process (CEAA 2012) in Cree Territory";

b) in February 2016 a detailed flow-chart which we called an "Adapted Cree-Canada Environmental Process in Cree Territory".

17. These documents set out in detail various options for solution to the Dispute. We have not yet been provided by our federal counterparts with options to settle the Dispute as they have yet to be fully mandated six (6) years after the *Moses* judgment, surprisingly.

18. We understand that these matters are excluded from your deliberations, as they are already subject to the formal Dispute Resolution Process. However, we wish to inform you in general terms of the Dispute and some recommended solutions.

19. Ironically, the federal reviews which lead to CEAA 2012 contributed to block progress. We expect that this mistake will not be repeated and that, this time, federal review will rather enhance and accelerate the settlement of the Dispute.

20. So, what is the solution for JBNQA territory? It is fairly simple and anchored in three (3) basic principles:

a) all reviews have to be done by the JBNQA Section 22 entities, not by entities that are foreign to the territory and its inhabitants;

b) all projects which have impacts on matters of federal jurisdiction, like navigable waters, fisheries, migratory birds or species at risk, migratory birds or which are otherwise triggered, should be screened and assessed;

c) the required permits from all authorities should also be obtained.

21. In other words, a provincial project such as a mine would be assessed by COMEX. If such project has potential impacts on matters of federal jurisdiction, like navigable waters, fisheries, migratory birds or species at risk, migratory birds, or if other jointly agreed triggers required it, it should also be assessed by COFEX. The COMEX and COFEX processes can be merged. Finally, all required permits should be obtained.

22. The Canadian Environmental Assessment Agency, Fisheries and Oceans Canada, the Ministry of the Environment and Transport Canada could all contribute to this process, through the JBNQA structures.

23. We have prepared summary flow-charts which demonstrate how federal assessment is currently carried out in JBNQA territory and how we see it evolving (see the flow-charts entitled "**Current Process for Assessments under the JBNQA and CEAA 2012**" and "**Proposed Process for Assessments under the JBNQA and federal legislation**").

24. In order to ensure certainty, we favour to amend Section 22 of the JBNQA.

25. Amending Section 22 would also allow the parties to modernize certain aspects

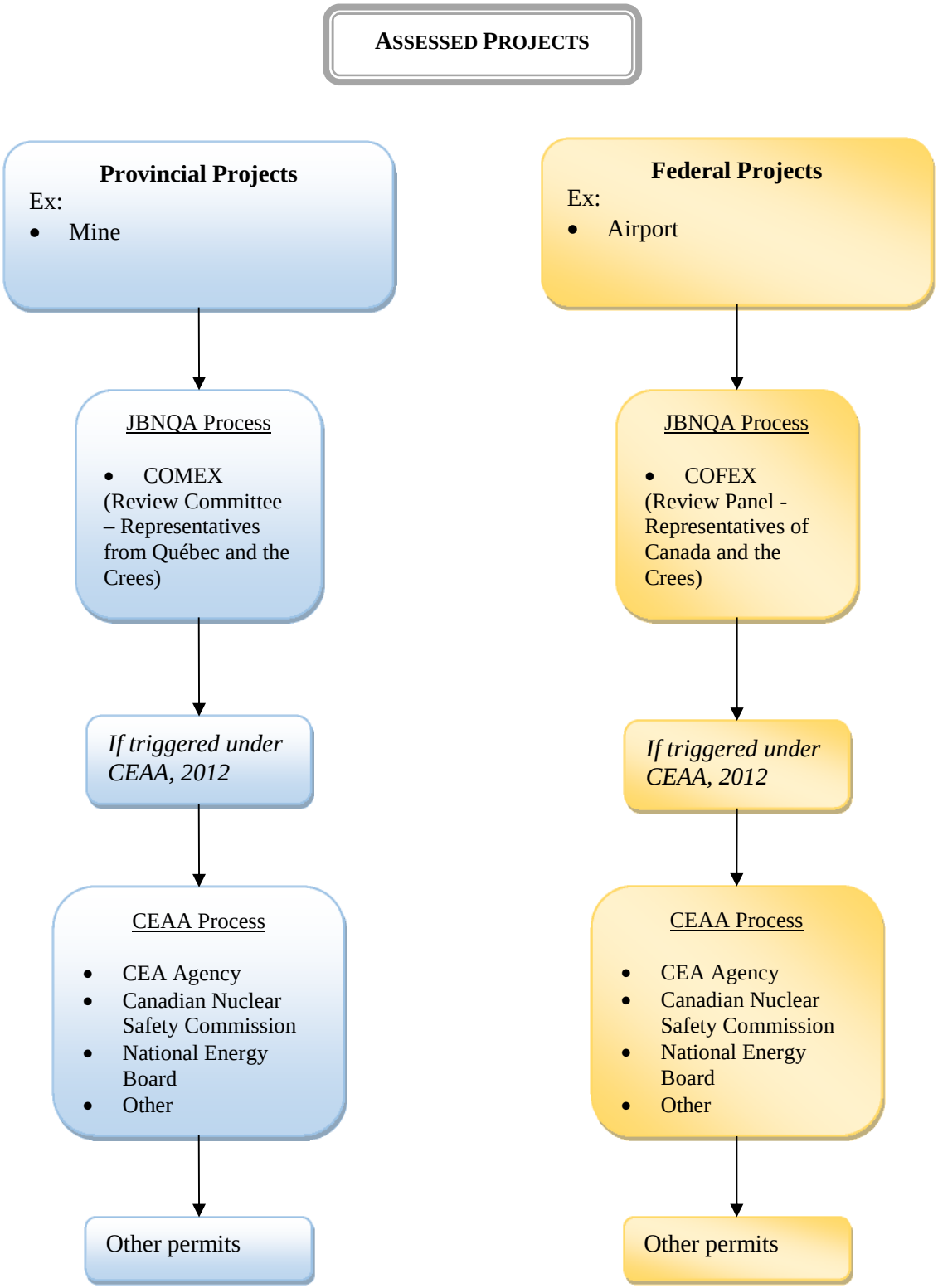
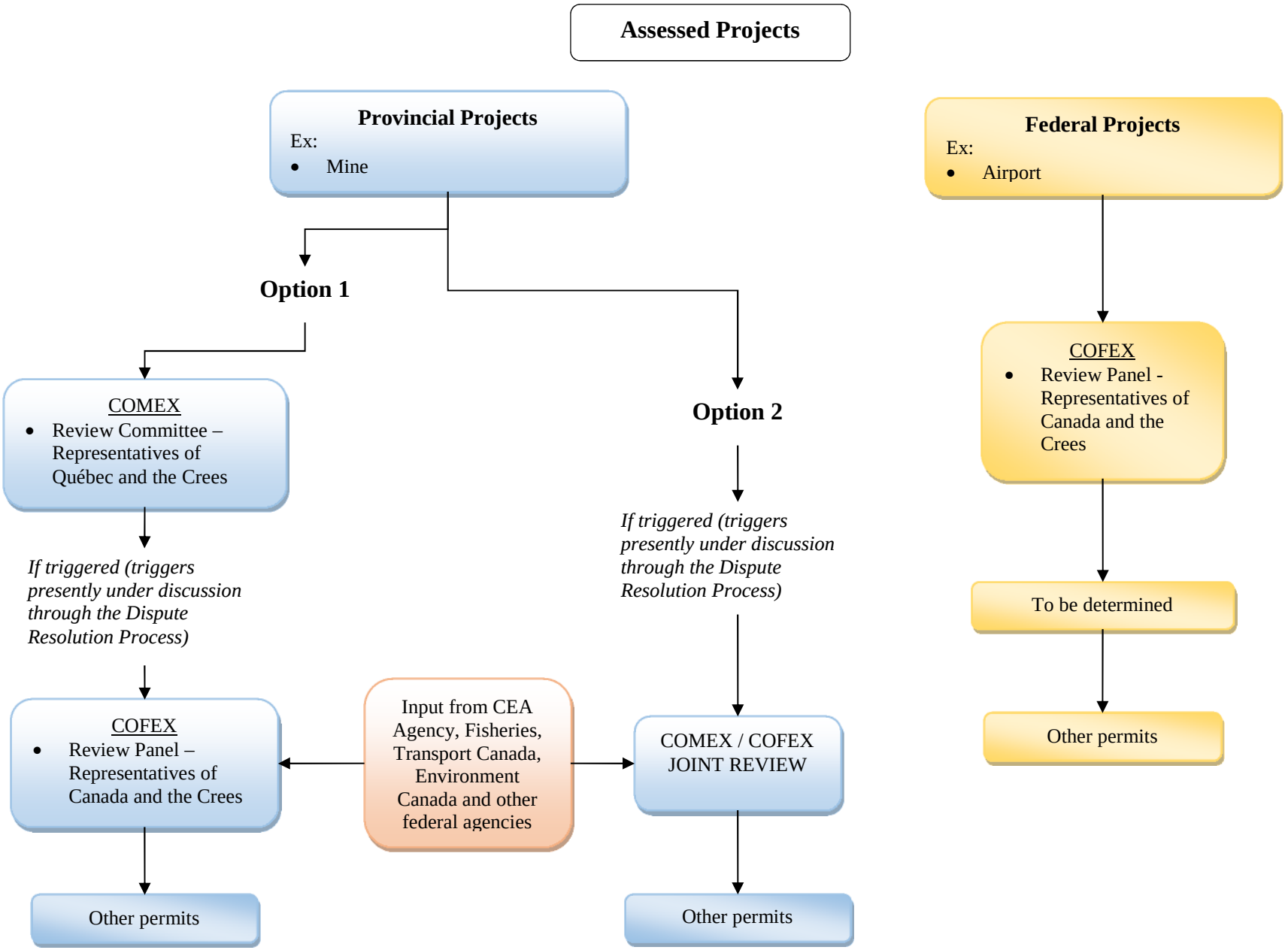
of the regime, which dates back from 1975 in order to ensure, notably, that the process is as transparent as it can be, in a manner similar to CEAA reviews.

26. It would be ideal to have Québec participate in this process, but we consider that nothing stops the Crees and Canada to modernize the parts of Section 22 of the JBNQA which touch upon federal matters.

27. We are available to answer any questions you may have. However, we must caution you that the discussions to resolve the dispute are confidential.

Meegwetch. Merci. Thank you.

Current Process for Assessments under the *JBNQA* and the *CEAA*, 2012



PROPOSED PROCESS FOR ASSESSMENTS UNDER THE JBNQA AND FEDERAL LEGISLATION